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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re PEACOCK GAP PROPERTIES, LLC, Debtor.	Case No. 09-34161 TEC Chapter 11 **MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS APPROVING DEBTOR-IN-POSSESSION FINANCING FROM FIRST CENTURY PLAZA, LLC** Hearing: To be determined

Peacock Gap Properties, LLC ("Debtor"), debtor and debtor-in-possession in the above-captioned case, hereby moves (the "Motion") pursuant to section 364 of chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code") and Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 4001(c) for an order approving debtor-in-possession financing of up to $150,000 (the "DIP Loan") from First Century Plaza, LLC ("First Century"). The DIP Loan is necessary to fund expenses relating to the preservation, maintenance, and operation of Debtor's business.

Continued operation of Debtor's golf course and facilities is necessary to preserve its value as a going-concern. Debtor is now operating its business in its off season, and revenues are insufficient to maintain its regular operations. Absent funding of the DIP Loan, Debtor will be unable to pay the expenses of continuing to operate and will be forced to shut-down. Such a cessation of business, even for a short period of time, would result in immediate and irreparable harm to the value of the business as a going-concern.

The Motion is based on the Memorandum of Points and Authorities set forth herein, the Omnibus Declaration of Jack Rose in support of Motion, the Introductory Statement and Certification of Compliance with Guidelines in support of the Motion, the pleadings and papers on file herein, and upon such further evidence as may be presented prior to or at the time of the hearing on the Motion.

I. JURISDICTION

Jurisdiction for the filing of this Motion exists pursuant to 28 U.S.C. §§ 157 and 133. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

II. FACTUAL BACKGROUND

A. Debtor's Business and Background

Debtor's business consists of an 18-hole golf course, a driving range, a 26,000 square foot clubhouse, a Pro Shop, bar, restaurant, and tennis court (the "Golf Course"), which Debtor acquired in April 2005 with an acquisition loan from Nara Bank ("Nara").

On December 30, 2009 (the "Petition Date"), Debtor filed a voluntary petition in this Court for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). Debtor continues to operate its business as debtor in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No trustee or creditors' committee has been appointed.

Debtor is now in the off-season for golfing. Revenues generated from the Golf Course operations are insufficient to pay ongoing business expenses, particularly vital services such as water, garbage and utilities. Debtor is already operating with minimal staff and a meager budget. If Debtor were to close the Golf Course, the going-concern value would be lost, eliminating any distribution to unsecured creditors. By keeping its doors open, Debtor is able to maintain payroll and generate some income to offset the costs it otherwise must incur to maintain the property.

On an operations level, Debtor has experienced significant staff attrition, and has recently lost its general manager and its full-time controller.[1] Debtor's previous controller has taken a full-time position elsewhere, but currently works for Debtor a few hours on the weekends. Debtor acknowledges that this is an inadequate solution. Debtor is in urgent need to hire a full-time manager to oversee its daily operations.

B. Litigation and Compromise

Beginning in about July 2006, Debtor and Nara began negotiations for a construction loan from Nara to Debtor for substantial renovation work at the Golf Course. Debtor contends that in August 2006, Nara approved and offered Debtor, in writing, a construction loan in the amount of $8 million, which Debtor accepted. On the strength of the representation of this $8 million construction loan, Debtor closed certain Golf Course facilities for renovations, expended about $2.5 million in land improvements, and hired construction contractors, architects, and engineers.

Debtor contends that in about May 2007, Nara refused to fund the $8 million loan and agreed only to fund a $3.2 million loan, leaving Debtor unable to complete construction. Debtor faced financial ruin.

Nara then commenced non-judicial foreclosure proceedings and a foreclosure sale was scheduled for January 4, 2010. Nara's foreclosure was based upon the deeds of trust securing the acquisition and construction loans. Shortly before the scheduled foreclosure sale, Debtor filed for protection under Chapter 11 of the Bankruptcy Code.

Soon after the Petition Date, Debtor filed a complaint (the "Complaint") against Nara for the alleged breach of an agreement to loan funds, for the alleged negligent misrepresentation of an agreement to loan funds, for an alleged breach of fiduciary duty, for an alleged breach of the covenant of good faith and fair dealing, for promissory estoppel, and for injunctive relief (the "Adversary Proceeding"). Debtor alleged that it suffered damages in excess of $24 million as a result of Nara's conduct. Nara disputed all allegations.

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[1] Debtor was forced to reduce its general manager's salary by 50% as of November 1, 2010 because of financial restraints. Debtor also took the responsible individual, Jack Rose, off of payroll as of November 1, 2010 for the same reasons.

During the discovery process, Nara sold to First Century Nara's promissory notes as well as any other claims in Debtor's estate. A notice of transfer of these claims was filed by First Century on November 5, 2010 as Docket No. 106.

Soon after Nara's transfer of rights to First Century, Debtor, Nara and First Century came to a global resolution (the "Compromise") regarding all disputed matters.

Pursuant to the terms of the Compromise, in exchange for dismissing the Adversary Proceeding, First Century agreed to provide Debtor up to $150,000 in debtor-in-possession financing to fund expenses relating to the preservation, maintenance, and operation of the Golf Course. The DIP Loan is conditioned on approval of the Compromise by this Court and approval of the parties' stipulation to hire Rajiv Parikh as interim manager.[2] If Mr. Parikh's employment is approved by the Court, Mr. Parikh will oversee the operations of the Golf Course and approve all Debtor's necessary and ordinary payments.

III. RULE 4001 CONCISE STATEMENT OF RELIEF REQUESTED

Through is Motion, the Promissory Note and Security Agreement (the "Loan Agreement"), a copy of which is attached hereto as **Exhibit A**, and pursuant to the proposed interim order approving the Motion (the "Interim Order"), a copy of which is attached hereto as **Exhibit B**, Debtor proposes to borrow up to $150,000 from First Century, Debtor's senior secured creditor, on the following material terms and conditions:

A. Maximum Borrowing Available: First Century shall advance up to $150,000 to Debtor to cover current and anticipated budget shortfalls at Debtor's Golf Course. All advances shall be requested by an interim manager, who shall be approved by First Century (subject to this Court's approval).

B. Priority Status/Liens: In exchange for the DIP Loan, First Century shall be: (i) allowed an administrative expense claim under 11 U.S.C. § 364(c)(1) with superpriority over all

[2] Motions to approve the Compromise and employment of Mr. Parikh as interim manager are to be filed concurrently with this Motion.

other administrative expenses of the kind specified in 11 U.S.C. §§ 503(b) or 507(b); and (ii) granted a lien against all unencumbered property of the Debtor's estate under 11 U.S.C. § 364(c)(2), including all Debtor's rents and profits. The funds shall be deposited in the Debtor's debtor-in-possession checking account (the "DIP Account"), and all withdraws from the DIP Account shall be for reasonable and necessary business expenses that are approved in advance by the interim manager. First Century shall have a first-position lien on all funds in the DIP Account as security for Debtor's obligation to repay the DIP Loan. First Century's lien on the DIP Account shall be deemed perfected automatically and without the necessity for filing financing statements or taking any other actions that might otherwise be required for protection under the Uniform Commercial Code.

C. **Interest Rate**: The DIP Loan will bear interest at the rate of 6.25% per annum.[3]

D. **Maturity:** The DIP Loan will mature and be due and payable in full on the earlier of (i) the date of confirmation of a plan of reorganization; (ii) the date of the closing of any sale of the Debtor's real property secured by First Century's liens, or (iii) February 15, 2011. There are no payments due under the DIP Loan prior to the maturity date.

E. **Events of Default:** The following shall be considered an event of default under the DIP Loan:

1. Debtor's failure to make any payment of any indebtedness to First Century when due;

2. A change in ownership or control of ten percent or more of the equity interest of Debtor;

3. Debtor's failure to obtain an entry of a final order approving the DIP Loan within twenty-five days of any interim order, subject to the Court's availability;

4. Issuance of an order staying, reversing, modifying, or vacating the interim order or final order of the DIP Loan; or

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[3] Debtor notes that the non-default rate under Nara's acquisition loan is 6.25% and the non-default rate under construction loan is 9%.

5. An entry of an order dismissing or converting the case or appointing a Chapter 11 Trustee or Examiner.

F. Miscellaneous: Immediately upon the (i) the consummation of any proposed sale of the Golf Course, as a going-concern and/or its real property, or (ii) an event of default, First Century shall have the authority to withdraw the remaining funds (if any) in the DIP Account and apply the same to the balance of the DIP Loan.

IV. NECESSITY OF DIP FINANCING

Given the current market conditions, alternate financing is not available on terms for favorable to Debtor or its estate. Debtor has exercised its sound business judgment in seeking approval of the DIP Loan, and approval will result in a substantial benefit to the estate by substantially funding payment of Debtor's previously incurred and ongoing administrative expenses claims. Accordingly, the Court should approve the DIP Loan on the terms and conditions stated herein.

The objective of the Compromise, DIP Loan, and appointment of an interim manager is to allow First Century an opportunity to conduct due diligence of Debtor's business to evaluate whether First Century can support a consensual plan of reorganization. If a plan is feasible, it would be a liquidating plan of reorganization in contemplation of the sale of Debtor's assets. If a plan is not feasible, then First Century expects to commence foreclosure proceedings.

V. DISCUSSION

The DIP Loan provides for Debtor to grant a priority administrative claim in the estate and to grant a lien against all unencumbered property of the estate, including a first-position lien on a all funds in the DIP Account and all Debtor's rents and profits. Debtor is not seeking to prime any party's existing lien rights. Debtor believes that the DIP Loan is in the best interests of the estate and its creditors, including all unsecured creditors. Without the DIP Loan, Debtor risks shutting its doors, jeopardizing the going-concern value of the business along with Debtor's chances of a successful reorganization.

As a general matter, if a debtor is unable to obtain unsecured credit, section 364(c) authorizes the "obtaining of credit or the incurring of debt - . . . (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b)of this title; (2) secured by a lien on the property of the estate that is not otherwise subject to a lien, or (3) secured by a junior lien on property of the estate that is subject to a lien." 11 U.S.C. § 364(c)(1) –(3). Typically, "courts apply a three-part test to assess requests under section 364(c), requiring a showing that (1) the debtor cannot obtain credit unencumbered or without superpriority status; (2) the credit transactions are necessary to preserve assets of the estate, and (3) the terms of the credit agreements are fair, reasonable and adequate." 3 COLLIER ON BANKRUPTCY ¶ 364.04[01] (15th ed. Rev. 2007)(citing In re Crouse Group, Inc., 71 B.R. 544 (Bankr. E.D. Pa.), aff'd 75 B.R. 553 (E.D. Pa. 1987)). In making that assessment, courts give broad deference to the business decisions and assessments of the debtor in possession, including the debtor in possession's business judgment regarding the need for and the proposed use of funds. As noted in In re Ames Department Stores, Inc., 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990), a "court's discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the Credit Agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party-in-interest." *See also* In re Defender Drug Stores, 145 B.R. 312, 317 (B.A.P. 9th Cir. Ariz. 1992).

Debtor believes it cannot obtain post-petition financing on terms and conditions more favorable to the estate than those offered by First Century and as set forth in the proposed Interim Order and that the DIP Loan is in the best interests of the estate and its creditors. Accordingly, Debtor believes good cause exists for approval of the DIP Loan. Without the DIP Loan, Debtor's reorganization efforts will be jeopardized. As noted above, the revenues generated from the Golf Course operations are insufficient to pay ongoing business expenses, including vital services such as water, garbage, and utilities. The DIP Loan would provide Debtor with enough funds to pay for any budget shortfall until a plan of reorganization is confirmed or sale of assets is closed. Debtor also notes that it is not seeking to prime any existing lien rights of creditors. Finally, since the proposed funding is critical to Debtor's continued operations and preserving its going-concern value, the DIP Loan is in the best interest of all creditors and the estate.

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VI. INTERIM APPROVAL SHOULD BE GRANTED

Rule 4001(c) of the Federal Rules of Bankruptcy Procedure provides that a final hearing for authority to obtain credit may be commenced no earlier than 15 days after service of the motion. If the motion requests, the court may authorize the obtaining of credit before the 15 day period expires to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

Debtor requests that the Court authorize Debtor's entry into the DIP Loan prior to the expiration of the 15 day period. Debtor requires immediate interim approval in order to cover existing shortfalls in Debtor's budget for reasonable and necessary expenses requiring immediate payment to avoid immediate and irreparable harm to the estate, including the employment of an interim manager for its operations, which it urgently needs. Debtor estimates that it will need approximately $125,000 of the $150,000 within the 15 day interim period for utilities.

VII. CONCLUSION

Debtor respectfully requests that the Court enter the attached Interim Order (1) authorizing Debtor to incur post-petition financing up to $150,000, on the terms set forth in the Loan Agreement, (2) setting a final hearing on the Motion (3) granting such order and further relief as the Court may deem appropriate.

Dated: November 19, 2010

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